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No. 96-1769

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioner,

v.

EUGENE WOODARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, KENTUCKY, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, WASHINGTON AND WYOMING IN SUPPORT OF PETITIONER

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(CAPITAL CASE)

QUESTION PRESENTED

1. Whether state clemency procedures may be reviewed under the due process limitations on a state's overall scheme of adjudication of crimes and punishment established by *Evitts v. Lucey*, 469 U.S. 387 (1985), or whether *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981) contains the sole due process limitations on those procedures.

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INTEREST OF *AMICI CURIAE* STATES

Amici curiae are the legal representatives of their states' executives and of the People in their states' postconviction litigation. The states have a weighty interest in the finality and enforcement of their state criminal judgments. This interest embraces concerns about the proliferation of postconviction claims and levels of federal judicial review.

Amici have a significant interest in this particular case since the *Woodard* court's opinion initiates an intrusive new level of federal judicial review into an area that has historically and exclusively been the domain of the state executive, clemency. Furthermore, the opinion applies a heretofore unknown due process analysis to a state's post conviction procedures.

Every state has vested virtually unfettered clemency powers in their executive branches. *See, e.g. Herrera v. Collins*, 506 U.S. 390, 414 fn. 14 (1993). The historic role of clemency as a non-judicial executive function for extending mercy to deserving claimants is threatened by the imposition of inadvisable and unspecified proceduralism with inevitable judicial review. Amici are concerned that the *Woodard* opinion will have a burdensome nationwide impact on the states' ability to enforce their criminal judgments, especially those in capital cases, and on the historic power of executives to exercise discretion in favor of mercy.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted since the Sixth Circuit Court of Appeals in *Woodard*, in an unprecedented action, applied the Due Process Clause to the purely executive function of clemency. Since all states provide for executive clemency, *Woodard* has a potential national impact.[1]

Historically and constitutionally, clemency has been the exclusive province of the almost completely unfettered discretion of the executive and has been immune from judicial review under traditional applications of the Due Process Clause. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 460 (1981). *Woodard* miscategorizes clemency as an integral part of the states' criminal adjudicative system and then goes on to misread *Evitts v. Lucey*, 469 U.S. 387 (1985) to create a second level of due process analysis. The *Woodard* opinion applies this new so-called "second strand" due process analysis to hold that clemency claimants are entitled to unidentified yet "barely perceptible" due process protections. This holding is not supported by either history or precedent and is barred by the doctrine of separation of powers between the executive and the judicial branches of government. It is certainly foreclosed by this Court's opinion in *Dumschat*.

Woodard's most fundamental error is to mischaracterize executive clemency as an integral part of the states' adjudication process for determining guilt or innocence under the states' criminal laws. Historically, clemency is the antithesis of the states' criminal adjudicatory process and instead is a non-judicial executive function that is based on extra-judicial concerns such as mercy and leniency. The decision is based on any information deemed pertinent to the decisionmaker without the constraints of procedure or precedent. Among the states, there is little or no

1. Petitioner is also presenting a second question to the Court relating to the application of the Fifth Amendment to clemency procedures. Although this brief concentrates only on the first question presented, amici curiae believe this Court should grant the petition as to both questions.

uniformity in the constitutional or statutory methods conferred on the executives in each state to dispense clemency. The one constant is the investment of virtually unfettered discretion in the executive branch. The injection of due process procedural requirements used by the judicial branch into this non-judicial process is contrary to the entire history and purpose of clemency and violates the separation of powers between these co-equal branches of government.

The *Woodard* opinion also introduces unprecedented levels of judicial review into a purely executive process which will further frustrate the states' interest in enforcing its judgments and interfere with the executives' clemency discretion. Ironically, just as this Court and the Congress have acted to revise and consolidate post-conviction review, *Woodard* further reopens issues already settled by this Court about state post-appellate review. *Woodard* improperly invites unprecedented and unnecessary federal judicial review of the states' judicial review systems as well as the executives' discretionary exercise of clemency. *Compare Sandin v. Connor*, ___ U.S ___, 115 S.Ct. 2293 (1995).

ARGUMENT

"[T]he expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1993). In *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 464, this Court held that inmates have no constitutional or inherent right to clemency. In *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990) this Court held that states which have otherwise complied with the Constitution's Eighth Amendment requirements, "enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished."

The States have organized their criminal justice systems in reliance on these holdings and the practices they represent.

Now, the Sixth Circuit's *Woodard* opinion potentially upsets the states' expectations based on these prior cases. For the first time, a federal court has held that state clemency claimants are entitled to unspecified "barely perceptible" due process protections traditionally only applied to review the state criminal adjudication process. Petn. at A-14. This holding is not supported by either history or case law. Unless review is granted, the opinion will surely add a new layer of delay and litigation in state and federal postconvictions cases, both capital and non-capital.

Woodard acknowledges that this Court in *Dumschat* held that clemency claimants do not have a liberty interest in the clemency proceedings themselves. However, *Woodard* then purports to discover a heretofore unknown "second strand" due process protection based on the majority's "belief" that clemency is an integral part of the states' criminal prosecution system for the adjudication of guilt or innocence. Petn. at A-11. Just as troubling, the *Woodard* opinion fails to even identify or describe these "barely perceptible" protections. The implication of the opinion is that clemency claimants may suddenly have unspecified, constitutionally guaranteed due process interests in the timing, notice, opportunity to be heard, discovery of information, and reasons for a clemency decision. Petn. at A-16.

Both of the premises of *Woodard* are wrong. Historically and constitutionally, clemency is not an integral part of the adjudication process and clemency claimants are not entitled to any due process procedural protections. Just as significantly, there is no "second strand" of due process protection within the Constitution. Both of these constitutional misconceptions in *Woodard* should be reviewed to preclude protracted and unnecessarily complex and costly litigation.

A. Woodard's Application Of The Due Process Clause To Clemency Is Constitutionally Inappropriate Since it Offends The Constitutional Plan for Federal-State Relations and the Historic Separation Of Powers Between The Judicial And Executive Branches Of Government

Woodard held that "barely perceptible" due process protections applied to Ohio's clemency process because the majority believed that clemency is an integral party of that state's adjudicative process for determining guilt and innocence. The *Woodard* majority analogized to this Court's holding in *Evitts v. Lucey*, 469 U.S. at 387 that defendants who appeal their criminal convictions were entitled to effective assistance of counsel since first appeals are an integral part of the states' adjudicative process.

However, *Woodard's* characterization of clemency as an integral part of Ohio's criminal justice system is fundamentally wrong. If the *Woodard* court had applied the appropriate due process analysis mandated by this Court in *Medina v. California*, at 437 and actually applied to clemency in *Herrera v. Collins*, 506 U.S. at 407-415 the majority would have concluded that clemency decisions in the states do not constitute adjudications and that determinations of guilt or innocence are not their primary objective.

In *Medina*, this Court reaffirmed that the states have the power to regulate their criminal justice systems. A state's decision does not violate the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, at 445. Conspicuous by its absence in *Woodard* is the historical analysis of clemency necessary under *Medina*. This analysis confirms that clemency is not a judicial or even quasi judicial function and instead is the exclusive responsibility of a separate and independent branch of government.

The clemency power in England traces back to the eighth century. *Herrera v. Collins*, at 412. Chief Justice Marshall relied on the historic clemency power in England when he explained in

United States v. Wilson, 7 Pet. (32 U.S.) 150, 160-161 (1833), that "from time immemorial" the executive power of pardon has been a private, but official act of the executive. Clemency is not intended to be "communicated officially to the court" and is to be distinguished from a judicial act. The pardon power exists as an unlimited power of the executive which is to be exercised totally independent of any judicial proceeding. *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1866). This Court reiterated in *Dumschat* that state clemency "decisions have not traditionally been the business of courts . . . ." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 464.

The pardon power as defined in the United States Constitution is designed to be an executive "prerogative" that was not to be "fettered or embarrassed." *Schick v. Reed*, 419 U.S. 256, 263 (1974). "To the executive alone is intrusted the power of pardon; and it is granted without limit." *United States v. Klein*, 13 Wall. (80 U.S.) 128, 147 (1871). As Judge Learned Hand explained, "It [the President's power to pardon] is a matter of grace, over which courts have no review. . . . It is by no means true that 'due process of law' inevitably involves an eventual resort to courts, no matter what may be the interest at stake; not every government action is subject to review by judges." *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2nd Cir. 1950) cited with approval in *I.N.S. v. Yang*, ___ U.S. ___, 117 S.Ct. 350, 353 (1996); *see also Ex Parte United States*, 242 U.S. 27, 42 (1916).

Justice Cardozo explained the clemency power in *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y.App. 1919) as follows:

> Such an application [for clemency] is not a proceeding in court, nor one before an officer having "attributes similar" to a court's. [Citation omitted.] It is a petition for mere grace and mercy . . . It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which are not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there is argument of counsel. . . . At such a time anything is pertinent that may move the mind to

> doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion be stirred.[2]

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2. Until *Woodard*, both federal and state courts have had the restraint repeatedly to hold that clemency decisions are not judicial functions and that the executive has unlimited discretion. It is exclusively executive and not reviewable by the judiciary, even under the Due Process Clause. *Solem v. Helm*, 463 U.S. 277, 301 (1983); *Solesbee v. Balckom*, 339 U.S. 9, 12 (1950); *United States v. Patti*, 291 F.2d 745, 746 (3rd Cir. 1961); *Spinkellink v. Wainwright*, 578 F.2d 582, ___ (5th Cir. 1978); *Wainwright v. Brownlee*, 103 F.3d 708, 709 (8th Cir. 1997); *Peck v. Battey*, 721 F.2d 1157, 1159 (8th Cir. 1983); *Binion v. United States Department of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983); *Green v. Teets*, 244 F.2d 401, 403 (9th Cir. 1957); *Hatch v. State of Oklahoma*, 92 F.3d 1072, 1076 (10th Cir. 1996); *Bundy v. Dugger*, 850 F.2d 1402, 1423-1424 (11th Cir. 1988); *Eacret v. Holmes*, 333 P.2d 741, 744 (Ore. 1958) and cases cited therein; *Banks v. Arizona State Board of Pardons*, 629 P.2d 1035, 1037-1038 (Ariz. App. 1981); *Arnold v. Board of Pardons & Paroles*, 805 P.2d 388, 391 (Ariz. App. 1990); *Williams v. State*, 898 S.W.2d 38, 39 (Ark. 1995); *Penn v. State*, 670 S.W.2d 426, 430 (Ark. 1984); *People v. Warren*, 224 Cal.Rptr. 746, 755 (Cal.App.1986); *Jenkins v. Knight*, 293 P.2d 6 (Cal. 1956); *People v. Herrera*, 516 P.2d 626, 629 (1973) and cases cited therein (Colo. 1973); *People ex rel. Dunbar v. District Court*, 502 P.2d 420, 422 (Colo. 1972); *Sullivan v. Askew*, 348 S.2d 312, 319 (Fla. 1977); *Bundy v. State*, 497 S.2d 1209, 1211 (Fla. 1986); *People v. Bradney*, 652 N.E.2d 428, 431 (Ill.App. 1995); *People ex rel. Symonds v. Gualano*, 260 N.E.2d 284, 290 (Ill.App. 1970); *Misenheimer v. State*, 374 N.E.2d 523, 532 (Ind. 1978); *Colvin v. Bowen*, 399 N.E.2d 835, 838-840 (Ind.App. 1980); *Whittington v. Stevens*, 73 S.2d 137, 139-140 (Miss. 1954); *State v. Hunter*, 477 A.2d 797, 802-803 (Me. 1982); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970); *Otey v. State*, 485 N.W.2d 153, 163-165 (Neb. 1992); *State v. Robinson*, 356 A.2d 449, 455 (N.J. 1976); *Holder v. State*, 488 P.2d 600, 602 (Okla. App. 1971); *Hennessey v. Pennsylvania Board of Pardons*, 655 A.2d 218, 220 & fn.2 (Pa. 1995); *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 (Ohio 1994); *Collins v. State*, 550 S.W.2D 643, 650 (Tenn. 1977); *R.R.E. v. Glenn*, 884 S.W.2d 189, 192 (Tex.App. 1994); *State v. Adams*, 115 S.E.2d 158, 163 (W.V. App. 1960); see also *Mallory v. State*, 435 P.2d 254, 255 (Id. 1967); *Milone v. Camp*, 22 F.3d 693, 705 (7th Cir. 1994)

While this Court's recent opinion in *Herrera v. Collins*, highlighted the opportunity for clemency in cases involving actual innocence, such determinations were not the primary historic function of clemency. Rather, the act of "pardon" was one of "forgiveness, release, remission." *Ex parte Wells*, 59 U.S. 307, 309 (1855). The pardoning power was intended to be an exception to the criminal code for cases of "unfortunate guilt" requiring "mitigation of the rigor of the law." *Schick v. Reed*, at 263 fn. 6 quoting *The Federalist No. 74*, pp. 500-501 (J. Cooke ed. 1961). Clemency is a decision based largely on the public interest and is not a mechanism for reviewing the defendant's guilt or innocence. See *Biddle v. Percovich*, 274 U.S. 480, 486 (1927). Indeed, grants of clemency often have carried and still do carry consequences of great disgrace, rather than exoneration. *Burdick v. United States*, 236 U.S. 79, 90-91 (1915) ("[T]he grace of pardon, though good in its intention, may be only in pretense or seeming. . . .") (Holmes, J.); *Murphy v. Ford*, 390 F.Supp. 1372, 1375 (W.D.Mich. 1975) (dismissing challenge to pardon of former President Nixon) (a pardon "does not wash out the moral stain . . . it involves forgiveness and not forgetfulness.")

Thus, on its own terms, *Woodard* is wrong. If the Sixth Circuit has truly spliced off a heretofore unseen "second strand" of due process, that mutant strand runs out long before the post conviction process reaches the executive clemency proceedings. Clemency is not part of the states' criminal justice systems for adjudicating guilt or innocence. The *Woodard* majority's principal authority, *Evitts* itself, characterized the first appeal as the "**final** step in the adjudication of guilt or innocence of the individual. . . ." *Evitts v. Lucey*, 469 U.S. at 404 [emphasis added]. This Court has refused to extend a due process analysis to the succeeding

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(no constitutional right to a clemency hearing); *Bean v. Nevada*, 410 F.Supp. 963 (D.Nev. 1974) *aff'd Bean v. Nevada*, 535 F.2d 542, 543 (9th Cir. 1976); *Rosenberg v. United States*, 346 U.S. 322 (1953) (Frankfurter, J. conc.) ("It is not for this Court even remotely to enter into the domain of clemency reserved by the Constitution exclusively to the President.")

stages of judicial post conviction review which normally occur well before the exercise of the executive clemency power. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Ross v. Moffitt*, 417 U.S. 600 (1974).

For example, this Court has characterized parole as an integral part of the penological system and specifically found it not to be a part of the criminal prosecution process. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). This Court's subsequent analogizing of parole to clemency in *Dumschat* indicates that the clemency process is not part of the criminal prosecution system that contained the appellate system at issue in *Evitts*. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 464. This Court also went on in *Dumschat* to explain that clemency is also to be distinguished from parole decisions since clemency decisions are historically standardless.

As the *Woodard* dissent further points out, the *Dumschat* dissent raised the same arguments that were adopted by the *Woodard* majority. Petn. at A-35. Therefore, this Court already implicitly rejected those arguments in *Dumschat*. *Clemons v. Mississippi*, 494 U.S. 738, 747-748 fn. 3 (1990). Although Justice Brennan authored *Evitts*, he actually concurred in the majority opinion in *Dumschat* because the clemency decision was based on the historically unfettered discretion of the executive.

This Court has also recognized the inevitable problems and conflicts that occur when federal courts engage in reviewing "essentially discretionary elements of state governance. . . ." *Cf.*, *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987). "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protections. . . ." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Intervention in this area raises "sensitive" and "troubling" issues relating to federal-state relations. *Herrera v. Collins*, 506 U.S. at 421 (C'Connor, J. conc.). *Woodard's* cryptic recognition of some sort of "barely perceptible" due process requirements for dispensing clemency smacks of the same kind of case-by-case approach to penal regulations this Court recently rejected in *Sandin v. Conner*, *supra*, at 2299-2300 and against which this Court has also drawn the line in post-conviction

procedures. *Coleman v. Thompson*, at 752; *Ross v. Moffit*, at 611-612. In light of *Woodard*, however, the pressure of new litigation to discover, explore, and enlarge these allegedly minimal, microscopic rights will be irresistible. Petn. at A-37. ("But once the camel's nose is under the tent . . . it may prove difficult to keep the rest of the animal out.")

Recognition of a heretofore unknown cause of action under section 1983 to judicially review an exercise of clemency will open the doors of the executive branch to the specter of intrusive federal civil discovery into what has always been considered confidential information. *Binion v. United States Department of Justice*, 695 F.2d at 1191. If such a possibility becomes reality in this case, it will be a further unwarranted byproduct of this invasion into what historically has been a purely executive function.

Based on history and precedent, the States have chosen a variety of ways to administer the executive clemency power. *Herrera v. Collins*, at 414. Surely, it cannot be said that the unfettered discretion of executive clemency violates the traditions and conscience of our People. *Medina v. California*, at 445.

"Our system of federalism encourages . . . state experimentation." *Greenholtz v. Nebraska Penal Inmates*, at 13. The imposition of burdensome or unwarranted procedures, coupled with federal court review, may lead to a curtailing of the clemency power altogether. *Ibid*. The development of increased proceduralism in both capital and non-capital cases actually increases the need for an equally unfettered clemency process. This Court endorsed the history of clemency under the Due Process Clause in *Herrera*. In doing so, this Court implicitly noted that the executive may consider evidence and arguments outside the purview of the judicial process. *Herrera v. Collins,* 506 U.S. at 417-419. As the plurality noted in *Gregg v. Georgia*, any prohibitions on discretion in the clemency process in capital cases would be totally alien to our notions of criminal justice and would be unconstitutional. *Gregg v. Georgia*, 428 U.S. 153, 199-200, fn. 50 (1976).

Amici submit that the "clemency process is-and should be-distinct from the judicial process. Mercy cannot be quantified or

institutional[illegible]. It is properly left to the conscience of the executive e[illegible]tled to consider pleas and should not be bound by court decisions meant to do justice . . . a frank, engaged painstaking process of authentic decision-making seems infinitely preferable to the dubious protections of proceduralism." Brown, *The Quality of Mercy*, 40 U.C.L.A. Law. Rev. 327, 328 (1992).

B. *Woodard's* Recognition And Use Of A New, So-Called "Second Strand" Due Process Analysis Is Constitutionally Inappropriate

Just as significantly, the "second strand" due process analysis *Woodard* applies to clemency is mere gossamer. The *Woodard* majority ignores the *Medina* analysis because it misapprehends *Evitts*. Petn. at A-12. In *Evitts*, this Court held that indigent criminal defendants who appeal their convictions are entitled to the effective assistance of counsel for their first appeal when the state has permitted such an appeal as a matter of right. *Evitts* categorized the first appeal as an integral part of the state's adjudicative process for determining guilt and innocence. This Court acknowledged that the states were not required to provide an appeal in all criminal cases, but explained that when the state chooses to act in an area where its action has "significant discretionary elements," it must act in accord with due process. *Evitts v. Lucey*, 469 U.S. at 401.

However, *Evitts* did not purport to create or to recognize any new "second strand" due process analysis. Ironically, *Evitts* itself is no more than an application of rule previously articulated by this Court in *Dumschat*: "A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 463. Consistent with *Dumschat*, *Evitts* focussed on the "nature" of the right rather than its relative "weight."

The state-created right in *Evitts* was a first appeal as a matter of right for criminal defendants. *Evitts* held that this state-created right "beget" a right to effective assistance of counsel on

appeal. This augmenting right was necessary because the State had acted to establish an appellate review process involving complex, intricate rules and procedures leading to a final judicial determination of guilt or innocence. *Evitts*, 469 U.S. at 394-395 fn. 6, 396, 402. This Court equated the denial of the effective assistance of counsel with the actual withdrawal of the right to appeal. *Id.*, at 400.

Evitts analogized its holding to *Morrissey v. Brewer*, *supra*. *Evitts v. Lucey*, 469 U.S. at 401. As previously noted, *Morrissey* is the lead case in a line of decisions including *Dumschat* and, most recently, *Sandin v. Connor*. *Morrissey* held that the state's creation of a parole system "beget" certain due process protections for parole revocation. Similar to the appellate right at issue in *Evitts*, parole revocation dealt with mixed issues of fact and law. Significantly, however, *Morrissey* also held that parole revocation is not part of the system for adjudicating guilt or innocence. *Morrissey v. Brewer*, 408 U.S. at 480. Moreover, in *Morrissey*, the Court distinguished between parole and the "ad hoc exercise of clemency. . . ." *Id.* at 477.

Morrissey led to this Court's decision in *Greenholtz v. Nebraska Penal Inmates*, *supra*. In *Greenholtz*, this Court recognized that the States had no duty to offer parole and that the mere availability of parole did not "beget" any due process protections. However, the mandatory nature of Nebraska's unique state parole release statute which limited the state's discretion in denying parole did entitle inmates to "some measure of constitutional protection." 442 U.S. at 12.

In *Dumschat*, this Court specifically rejected the argument that a state's practice in the wholly and expressly discretionary area of clemency created a constitutional entitlement. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 465. Moreover, absent any state law defining the obligations of the clemency authority, "the mere existence of a power to commute . . . create[s] no right or 'entitlement'." *Id.* at 467. "[T]he decisionmaker can deny the requested relief for any constitutionally permissible reason or for no reason at all." *Ibid.* (Brennan, J. conc.). Furthermore, as long as the ultimate decision was at the discretion of the decisionmaker,

state-created procedures for arriving at that decision do not create a liberty interest. *Compare Olim v. Wakinekona*, 461 U.S. 238, 248-251 (1983).

Thus, contrary to *Woodard*, *Evitts* is actually part of the same circle of cases that includes *Dumschat*, *Morrissey*, and *Greenholtz*. *Evitts* does no more than apply a rule that was earlier articulated in *Dumschat*.[3] Except for *Dumschat*, all of these cases "beget" degrees of due process protection to the possible termination or withdrawal or denial of state-created rights pursuant to various rules or standards. *Dumschat* did not apply due process protections to the executive clemency power because if clemency is to be effective it cannot be based on any particular rules, standards, procedures, grounds, criteria, or reasons. As *Dumschat* recognized, any other result would have been paradoxical. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 466. *Woodard* ignores this paradox.

In *Evitts*, it was the right to a judicial appeal as part of state's adjudicative process for determining guilt or innocence which was found to have due process implications. However, *Evitts* did not purport to establish a separate due process analysis based on the "integral" role of the procedure in the state's process. If this Court had based its holding on that premise, then *Evitts* would have been inconsistent with this Court's jurisprudence which holds that due process protections are determined by the "nature" of the right at issue, not its "weight." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 7. It was for this reason that this Court held in *Dumschat* that clemency does not "beget" due process protections because there is no right at issue — only an expectation or unilateral hope. *Woodard* makes the mistake of focussing on what it perceives to be the "weight" of the "right" at issue, rather than its "nature." *Woodard* ignored the real common meaning of both *Dumschat* and *Evitts*.

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3. *Evitts*'s description of the "integral role" of appeals also does no more than repeat language first used by this Court in *Griffin v. Illinois*, 351 U.S. 12, 18 (1955).

The *Woodard* opinion's recognition and use of a heretofore unknown "second strand" of due process is rife for mischief. Until *Woodard*, the integral role of a particular procedure in a state's criminal adjudication system was not determinative of due process protections. This Court's other decisions which held that traditional procedural due process protections did not apply to discretionary appeals and state collateral review were consistent with that approach. See, e.g. *Coleman v. Thompson*, *supra*; *Ross v. Moffitt*, *supra*. *Woodard's* discovery of a "barely perceptible" microscopic "second strand" due process right ignores the line and logic of these other cases. Just as ominously, in the same way that *Woodard* has now reopened the clemency issue decided in *Dumschat*, it reopens the issues in those other cases as well.

Amici submit that *Woodard's* splicing of a "second strand" of due process amounts to nothing more than result-oriented hairsplitting. It is inconsistent with this Court's due process cases as exemplified by *Dumschat*, *Medina* and *Evitts*. This Court should grant the petition for writ of certiorari to stabilize the due process jurisprudence potentially disrupted by *Woodard*.

The decision to grant or deny clemency and the means used by the executive branch to make this decision are not compatible with judicial review. In fact, judicial review of this ancient executive prerogative would itself involve an unconstitutional violation of the separation of powers doctrine.

CONCLUSION

For the reasons stated, as well as those set forth in the petition for writ of certiorari, amici curiae request that the petition be granted.

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